

ORIGINAL

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of )  
 ) MM Docket No. 87-268  
Advanced Television Systems )  
and Their Impact Upon the )  
Existing Television Broadcast )  
Service )

Comments  
of  
Fox, Inc.

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INTRODUCTION

Fox, Inc. (Fox) is the parent company of, among other entities, Twentieth Century Fox Film Corporation (a major motion picture producer), Twentieth Television (a national television program producer and syndication), Fox Broadcasting Company (distributor of a national program service to 140 affiliated television stations nationwide, 123 UHF and 17 VHF) and Fox Television Stations (licensee of seven television stations, 3 UHF and 4 VHF).

In its capacity as a major television broadcaster, producer and distributor, Fox has enthusiastically supported the Commission's efforts to introduce terrestrial broadcast advanced television as rapidly and economically as possible. Toward this end, Fox Television Stations has entered into an agreement with Harris Allied Broadcast Division to purchase ATV transmitters for

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its seven owned stations after a transmission standard is adopted by the Commission. Thus, Fox anticipates that its station group will be the first in the nation to broadcast with advanced television technology.

Fox has joined in and supports the Joint Broadcaster Comments filed in this proceeding today. These separate comments are filed solely to amplify with our own, additional views the discussion of simulcasting at II.C., pages 21-23 of the Joint Broadcaster Comments, which we fully endorse. These comments address questions raised at paragraphs 58-67 in the Second Report and Order/Further Notice of Proposed Rulemaking (Notice) in the above-referenced docket.<sup>1</sup>

#### DISCUSSION

There are two separate, but related issues raised by the Commission in connection with the simulcast options: the definition of simulcasting, i.e., how flexibly broadcasters may program while still meeting any simulcasting requirement, and the extent of and timetable for any simulcasting requirement.

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7 FCC Rcd 3340 (1992).

The Commission Should Defer any Decision on Simulcasting Until it Revisits its Conversion Deadline in 1998.

We support the Joint Broadcasters' suggestion that the Commission should defer any final decision on NTSC/ATV simulcasting requirements, at least until its 1998 review of the proposed conversion deadline, when more information will be available on which to base such a decision.

Throughout this proceeding the Commission has struggled with the Herculean task of balancing the many competing interests along the road to an all-ATV world. The Commission has determined, wisely, we think, that the most expeditious way of achieving the public interest goal of conversion to ATV is to announce a conversion deadline at a date certain in the future, making clear its commitment to the cessation of NTSC broadcasting as of that date. Today, the date announced, 15 years from adoption of an ATV system or a final Table of ATV Allotments, appears adequate. However, the Commission, wisely again, has announced that it will review this deadline in 1998, after the 5-year application/construction period.

Assuming that the 15-year deadline remains in effect, broadcasters will have been given five years to construct an ATV transmission facility and, effectively, 10 more years to

implement ATV studio production capability.<sup>2</sup> Throughout this 15-year period, there still will be NTSC-only receivers in the marketplace (although, unless consumer down-conversion equipment is available, existing NTSC equipment will be obsolete as of the conversion date). The Commission fears that at some point during this transition period, broadcasters develop ATV capability, they will begin to neglect their NTSC channel programming and effectively disenfranchise viewers that chose not to purchase ATV equipment. The Notice thus has identified a public interest in the preservation of NTSC service for NTSC receivers in the marketplace during the transition period. Its proposed solution to this anticipated dilemma is to require broadcasters to simulcast the same programs on both NTSC and ATV channels.<sup>3</sup>

On the other hand, the Commission recognizes that broadcasters "may need some initial reprieve from full simulcasting requirement,"... "in order to develop and produce programming that will best exploit the benefits of ATV and attract consumers to this new technology...." (Notice, at

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<sup>2</sup> See Notice at paragraph 53, p.35 and n.156.

<sup>3</sup> The Notice also states that having the same programming on both channels will make it easier to require the return of the NTSC channel than if there is different programming on the ATV channel; however, as the Commission has announced that NTSC broadcasting must cease as of 2008, the fate of the NTSC channels would appear to be beyond doubt.

paragraph 61, p.40). Also recognizing that broadcasters are unlikely to abandon NTSC service while ATV penetration is low, the Commission proposes a two-year delay after completion of the 5-year application/construction period before implementing any simulcasting requirement and, thereafter, an incremental phase in of a simulcasting requirement over four years.

Establishing at this early date any simulcasting requirement, especially a projected scenario with this level of detail, may constitute regulatory overkill. The intricate balancing of the sometimes-competing interests of expeditious and economical ATV implementation and NTSC preservation during the transition to ATV may better be left to the marketplace.

Even the definition of simulcasting seems to have been extended beyond its traditional meaning of "same program content" into the realm of production standards. Throughout the course of this proceeding, and previously, the Commission rightfully has declined to involve itself in the setting of program production standards. The Commission has established and encouraged ATV transmission capability with its five-year "use-it-or-lose-it" application/construction period, and it has effectively set outside parameters for ATV production capability by establishing a firm conversion deadline. But, as the Commission begins to

orchestrate in greater detail how it sees this 15-year period unfolding, i.e., what kind of programming on which channel and when, the very notion of "simulcasting" becomes confused.

During the period before full simulcasting would be required (years 5-9), the Commission states that it will not permit up-converted NTSC programming on the ATV channel that is different from the NTSC programming on the NTSC channel, and adds that it expects nonsimulcast programming on the ATV channel "to take full advantage of the ATV mode," listing several production modes that it considers "would take full advantage of the technical capability of the ATV mode." <sup>4</sup> This statement seems to contradict the Notice's suggestion that studio conversion to ATV will take place over the full 15 years as a progressive process:

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<sup>4</sup> Notice, at paragraph 65, p.43. While the spatial sharpness and aspect ratio of recent films, at least, may render existing film productions a readily-available source of early ATV programming, is not at all clear that any film production ever could "take full advantage of the ATV mode," because the temporal resolution of film, at 24 frames per second, will be inferior to that of ATV, at 30 or 60 frames per second, depending upon which ATV system is selected. Indeed, pre-1955 films were produced in a 4 x 3 aspect ratio (which in fact dictated the present 4 x 3 NTSC TV aspect ratio). The aspect ratio of film was widened for Cinemascope in 1954; thus, pre-1955 films will not have an ATV-suitable aspect ratio.

It also should be pointed out that much television programming today does not "take full advantage of the NTSC mode" in the sense that the Notice implies this with regard to ATV. This includes much ENG material and tape-delayed programming.

"[b]y the conversion deadline, broadcasters should have implemented studio production capability." This suggests that the Commission (realistically) will neither require nor expect full ATV production capability until the end of the conversion period, when the demise of NTSC will force studio conversion, if it has not already occurred as a natural process. See n.2, supra. With respect, it is not clear what the Commission intends. The Commission's expectation that broadcasters should have implemented ATV studio production capability by the end of the 15-year conversion period seems inconsistent with the requirement that nonsimulcast programming in the first four years "take full advantage of the ATV mode."

The Commission should not and need not create a de facto production standard during the transition to ATV. Once ATV transmission capability is created, up-conversion of NTSC programming will yield an immediate and significant improvement in quality for those purchasing ATV receivers, and ATV production capability will develop as ATV receiver penetration and equipment availability permits this to be done in an expeditious fashion. How this will occur is dependent upon many factors that are as yet unknown. It is too soon to tell when ATV receivers will be available at affordable prices, or when dual-mode professional production equipment will be

available and at what cost. In any event, ATV production standards should not become an element in the definition of simulcasting.

Indeed, the Commission already has built into its ATV development process an appropriate window from which these issues might be examined. In 1998, when it revisits its proposed conversion deadline, the Commission will be in a better position to assess the state of the television industry, including factors such as initial ATV set penetration, the development of ATV programming, the need of broadcasters to recoup investment in advanced television and, of course, consumer reaction to the ATV environment that exists at that time. For example, all licensees may be simulcasting, anyway, even though there is no requirement; alternatively, consumers may be purchasing ATV sets at significantly greater rates in markets where ATV broadcasters are providing somewhat diverse, as opposed to duplicated, program offerings. It will facilitate rapid ATV development for the to Commission allow the industry (and itself) to have some real-world experience with the transition to ATV technology before imposing rigid program requirements whose effect upon the proliferation of advanced television cannot be predicted.



Such an approach is not likely to imperil NTSC service prematurely. As an advertiser-supported medium, TV broadcasting is responsive to consumer preferences. At least in the initial phases of ATV implementation, broadcasters most likely will continue to provide quality NTSC programming whether or not they are required to do so, because ATV receiver penetration still will be low. Broadcasters will not abandon their NTSC viewers.

Initial ATV receiver purchasers most likely will retain their NTSC sets, as well; moreover, it is almost inconceivable that all ATV receivers will not also receive NTSC signals, at least in the initial phases of ATV implementation. Thus, early ATV receiver owners will continue to receive both NTSC and ATV. Such TV households probably would be better served by more diverse, as opposed to simulcast, ATV program offerings. Additionally, we believe that the ready availability of inexpensive down-conversion equipment will diminish the likelihood of NTSC viewer disenfranchisement, as opposed to retarding ATV penetration, as the Commission fears.

Indeed, if inexpensive down-conversion equipment can be obtained throughout the transition period, this would afford NTSC receiver owners a means of retaining the same service as that supplied on ATV channels. Even if broadcasters did begin to devote significantly more resources to ATV than to NTSC

programming, NTSC viewers would not be prematurely disenfranchised thereby, but would have a means of enjoying the same program fare as ATV viewers. Just as the A/B switch alternative to cable must-carry rules, this should be considered as a less restrictive alternative to a simulcasting requirement, as it would achieve the same public interest goal, preservation of service to NTSC viewers during the transition to ATV.

Indeed, the First Amendment concerns in connection with required simulcasting are subtle, yet palpable. In First Amendment terms, simulcasting is content neutral, that is, it is a restriction on speech imposed not on account of the content of the speech itself, but purportedly to achieve other governmental goals. Nevertheless, just as with the several Constitutional challenges to the must-carry rules under the standard set out in U.S. v. O'Brien, 391 U.S. 367 (1968), it is respectfully submitted that a court could well find the proposed 100% simulcasting regulation restricts free expression more extensively than necessary to achieve the governmental interest at stake, particularly absent a showing of the need for such a requirement. See Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. (1985), cert. denied, 476 U.S. 1169 (1986); and see Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir.), Clarified, 837 F.2d 517 (D.C. Cir. 1987), cert. denied, 468 U.S. 1032 (1988).

The Commission has historically kept its regulations affecting program content to a minimum, even where they are essentially content neutral, on account of First Amendment concerns. Requiring the same programming at all times on two channels would seem to fly in the face of such sensitivity. Less restrictive alternatives such as the availability of affordable down-conversion equipment for NTSC receivers should be considered thoroughly and a 100% simulcasting regulation only adopted as a last resort.

Moreover, if such a stringent measure is not absolutely necessary to protect the quality of NTSC service while NTSC receivers are in the marketplace, a strict 100% simulcast requirement should be avoided also because it may well impede ATV development in the marketplace. It is unknown now whether consumers will purchase ATV receivers based solely upon the improved picture and sound quality ATV can provide, or whether the promise of enhanced or different overall program offerings will be necessary to provide an added incentive, at least in the early years.

As the Commission recognizes, it will be up to broadcasters to "explore the creative potential of the ATV mode and attract viewers to ATV." In order to begin to do so, broadcasters must be afforded some latitude to diverge from their NTSC program

line-ups. To the extent that ATV is permitted to bring, if not diverse program offerings, at least novel viewing modes to over-the-air television, ATV receiver penetration may well be stimulated. As we have seen with the proliferation of home satellite dishes, especially in areas that already can receive the major broadcast signals off the air and those that are cabled, consumers are clearly willing to invest in high-end receiving capability to enjoy otherwise-unavailable programming.

Broadcasters must be able to experiment creatively with advanced television, both in order to fund their initial investment in ATV and to maximize the medium's transmission capabilities. To the extent that broadcasters are permitted to provide the value-added suited uniquely to ATV, receiver penetration will likely be stimulated and additional advertising revenues available. Pay-per-view or other types of subscription

operation may be appropriate for certain ATV productions. Those revenues may well be necessary to fund dual-channel operation and maintain service to both NTSC and ATV viewers.<sup>5</sup>

Permitting Ancillary Uses of ATV Spectrum Could Provide Additional, Needed Revenues for Broadcasters and is in the Public Interest.

Another possible means of producing additional revenues would be for broadcasters to be permitted to use for ancillary purposes excess data capacity that is not required for ATV transmission but otherwise would remain fallow in the ATV channel, both during non-operation time (such as overnight) and during ATV transmission on a non-interfering basis. There is precedent for permitting non-interfering ancillary uses in the

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<sup>5</sup> As a more general matter, although we understand and support the rationale for the Commission's ruling that the ATV channel may not be used for multiplexed NTSC service (Notice, at paragraph 11, p. 11), we trust that the Commission is not ruling out the use of digital compression techniques that may be developed in the future for ATV. Given the rapid pace of technological development today, it would be premature to do so. It would be more appropriate for the Commission to remain open to considering future innovations. For example, if digital compression should one day permit multiple ATV images on a single 6-MHz channel, without significant quality degradation, this would be just the sort of innovation that could put broadcasters on a more even footing with their multichannel competitors. Such developments should be encouraged, we submit.

NTSC service, e.g., SAP, SCA, VBI. Such ancillary uses would not affect any simulcast requirement one way or another, and it would maximize use of the spectrum.

If the Commission Should Continue to Believe That a Simulcasting Requirement is in the Public Interest, it Should Adopt its Proposed Flexible Definition of Simulcasting.

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The Notice proposes to define "same program" as "one which has its basis the same underlying material." Fox supports such definitional flexibility, as it would permit variances to accommodate the different characteristics of ATV versus NTSC, e.g., different aspect ratios, angles, or numbers of cameras, or commentary in connection with different camera angles. Flexibility within the "definition of same underlying program" is both necessary and desirable to accommodate such basic differences. For example, if editing techniques such as panning and scanning or letter-boxing are required to transfer the same underlying program material from one aspect ratio to another, it would be difficult to consider such material "different programs."

"Program" also should be defined to exclude commercials and promotional announcements. Programs of some minimum length also might be excluded. The Commission suggests that such definitional flexibility could alleviate concerns that a

simulcasting requirement would raise First Amendment problems or have a chilling effect on program content, and we agree. As a practical matter, the less rigid the definition, the less onerous compliance with a simulcast requirement is likely to be for broadcasters.

The Notice also suggests permitting time-shifting of ATV and NTSC programs within the definition of "same program." Fox supports this proposal, as well. Viewers would have an opportunity to receive the same program on both channels, but they would be able to see it at different times. Within the rubric of time shifting, broadcasters may wish to pre-release ATV productions, perhaps on a pay-per-view basis, as well as to provide multiple plays at different times of ATV programs.

In order to develop the ATV as the new, and eventually sole, television broadcast service, not just because the initial investment in ATV transmission equipment (not to mention ATV programming and/or production equipment) will be costly (perhaps without producing additional revenues), but also because the value ATV will add to television is unknown as yet and must be explored, flexibility as to the definition of what constitutes "simulcasting" is in the public interest.

## CONCLUSION

It is premature now to determine whether a simulcasting requirement will be necessary, or even desirable, in the transition to ATV. Initially, when ATV receiver penetration is low, NTSC program offerings are not likely to suffer in relation to ATV. While ATV receiver penetration increases will stimulate ATV program production, the least expensive way to offer NTSC product will in all likelihood be down-conversion from ATV to NTSC. Thus, quality NTSC programming will doubtless continue to be provided. Up-conversion for digital transmission will markedly improve the quality of NTSC programming. Therefore, whether NTSC programming is up-converted to ATV or ATV programming down-converted to NTSC, it nevertheless is likely that the same program content will be carried on both channels, absent a simulcasting requirement.

The Commission always has the option of addressing the simulcast issue as ATV develops. Immediately after the initial 5-year application/construction period, implementation will just have begun, but, thereafter, the Commission will begin to have some concrete evidence on which to base a decision as to whether and when a simulcast requirement should be imposed. Receiver



availability and penetration information will be more than hypothetical; the costs associated with ATV-produced programming will begin to be known.

Rather than locking into a regulatory scenario for the future now that is necessarily largely based on hypothesis, the Commission can avoid potentially costly miscalculation simply by withholding judgment until there is some basis on which to judge. Fox respectfully urges the Commission to follow this course and not finalize any simulcasting requirements until it reassesses the conversion deadline in 1998.

Respectfully submitted,



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